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# In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 945

NEWELL M. HARGETT, PETITIONER

*v.*

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (Pet. App. C 96–101)* is reported at 137 F. Supp. 876. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 8a–12a) is not yet reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on March 21, 1957 (Pet. App. 8a). The petition for a writ of certiorari was filed on April 27, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

*"Pet. App. C" refers to the Joint Appendix in the court below.

## QUESTIONS PRESENTED

1. Whether the removal of petitioner from his position as postmaster could be accomplished by the Post Office Department through normal civil service procedures and without the personal action of the President.

2. Whether the Administrative Procedure Act conferred jurisdiction to review the substantive merits of a procedurally valid discharge of a federal employee.

3. Whether petitioner's removal from his federal employment was accomplished with full observance of his rights under Section 14 of the Veterans' Preference Act.

## STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the appendix to the petition at pp. 1a–7a.

## STATEMENT

Petitioner was appointed a postmaster of the first class at Maysville, Kentucky, by the President on June 2, 1949 (Pet. App. C 79–80) and his appointment was confirmed by the Senate. On June 12, 1954, the Post Office Department advised petitioner in writing of his proposed removal from this position on the two grounds of inefficiency as postmaster and of failure to devote eight hours a day to his duties as postmaster (Pet. App. C 1–11).[1] Petitioner replied to

[1] Charge No. 1, relating to petitioner's inefficiency, contained three specifications, to which was appended a list of 38 irregularities of an operating nature and 11 irregularities of a custodial nature. Charge No. 2, dealing with petitioner's failure to devote eight hours a day to his duties, contained five specifications.

these charges and, on August 16, 1954, was served with a letter of dismissal (Pet. App. C 27). This letter, signed by the Assistant Postmaster General referred specifically to the statement of charges of June 12, 1954, and advised petitioner (Pet. App. C 27):

> * * * After consideration of the evidence submitted, including your reply, it has been decided that the charges have been sustained.

Petitioner's dismissal was affirmed, after a hearing, by the Sixth Regional Office of the Civil Service Commission (Pet. App. C 29–34) and, upon his further appeal, by the Civil Service Commission's Board of Appeals and Review. The Board concluded, after an exhaustive discussion and analysis of the evidence (Pet. App. C 34–75), that, although certain of the specifications or irregularities supporting the charges against petitioner had not been established, a great majority of them had been proven and these were more than sufficient to sustain the basic charges (Pet. App. C 76–77).

Petitioner then brought this suit in the District Court, seeking to enjoin the respondents from removing him from his position as postmaster, and to have his dismissal declared null and void (Pet. App. 79–87). The District Court denied petitioner's motion for summary judgment and granted that of the respondents (Pet. App. C 101), and, on petitioner's appeal, the Court of Appeals affirmed (Pet. App. 8a–12a). Rejecting petitioner's claim that only the President could remove him, both courts held that petitioner's removal was properly governed by the normal civil service pro-

cedures and that, in any event, the Postmaster General in removing him was presumed by law to act for the President. The decisions below held further that the procedures of the Veterans' Preference Act were fully observed in effecting petitioner's removal and that petitioner was not entitled under the Administrative Procedure Act to a general judicial review of the merits of his dismissal (Pet. App. C 96–101; Pet. App. 8a–12a).

**ARGUMENT**

Petitioner was dismissed with full observance of all of his substantive and procedural rights as a classified civil service employee with the status of a veterans' preference eligible. His removal was approved on the merits by the Civil Service Commission's Regional Office after a full hearing, and further confirmed by the Commission's Board of Appeals and Review, which carefully examined the record and wrote a lengthy opinion. This administrative action was affirmed in its procedural aspects by both courts below. Petitioner has thus received the full measure of review to which he is entitled, and there is no basis for further review by this Court.

1. Contrary to petitioner's contention (Pet. 8–13), this case presents no issue as to the removal powers of the President. Postmasters of the first class are by statute appointed in the classified civil service and are removable in accordance with standard civil service removal procedures. And even if Presidential action were necessary to remove petitioner, it is settled that the Postmaster General, who dismissed petitioner here,

is presumed in law to act for the President in these circumstances.

*a.* Although appointed by the President by and with the consent of the Senate, petitioner as a postmaster of the first class is, by statute, expressly within the classified civil service. 39 U. S. C. 31a (Pet. App. 6a). The Postmaster Appointment Act of 1938, 39 U. S. C. 31, *et seq.*, substituted "the merit system for the spoils system in the selection of postmasters" by extending the classified service to include postmasters of the first, second, and third classes. S. Doc. 224, 75th Cong., 3rd Sess., p. 3. By this statute, appointments and promotions to such positions were made subject to civil service regulations and examinations (39 U. S. C. 31b) and, by Section 20 of the Veterans' Preference Act, to the removal and other procedures of that statute. 5 U. S. C. 869. As a result of these statutes, petititoner "is removable in accordance with the same procedures as any other classified civil service employee and Veterans' Preference eligible" (opinion of the Court of Appeals, Pet. App. 9a–10a).[2]

*b.* Even if petitioner's removal required Presidential action, it is clear that the action of the Postmaster General in dismissing petitioner met this requirement. The courts have held many times that the authority vested by Congress in the President may

[2] As the District Court observed (Pet. App. C. 98):

> Plaintiff concedes that he a member of the classified civil service and, while he accepts the benefits of such classification, he refuses to accept its procedures for removal. Plaintiff attempts to establish a unique classification for himself, one which has no basis in law.

be validly exercised by subordinate executive officials. See, for example, *United States* v. *Farden*, 99 U. S. 10, 19, holding that the suspension of a collector of internal revenue by the Secretary of the Treasury was valid under legislation reposing such power in the President alone, since "the act of the Secretary, the head of the Treasury Department, is presumed to be the act of the President," 99 U. S. at 19; and *Porter* v. *Coble*, 246 Fed. 244, 249 (C. A. 8), holding that the Postmaster General, in removing a postmaster, was presumed in law to be acting for the President. See, also, *The Confiscation Cases*, 20 Wall. 92, 109; *Russell Co.* v. *United States*, 261 U. S. 514, 523; *Wolsey* v. *Chapman*, 101 U. S. 755, 769–770; *Wilcox* v. *McConnel*, 13 Pet. 498, 513; *Williams* v. *United States*, 1 How. 290, 297; *Creary* v. *Weeks*, 259 U. S. 336; *French* v. *Weeks*, 259 U. S. 326; *Updegraff* v. *Talbott*, 221 F. 2d 342 (C. A. 4); *Seltzer* v. *United States*, 98 C. Cls. 554, 560.[3]

[3] The Presidential Delegation Act, 3 U. S. C. 301, *et seq.*, far from supporting petititoner's position, carefully protects the continued validity of this rule by providing that "nothing herein shall be deemed to require express authorization in any case in which such an official would be presumed in law to have acted by authority or direction of the President." 3 U. S. C. 302.

The fact that the letter dismissing petitioner was signed by the Assistant Postmaster General does not, of course, make petitioner's discharge any less the act of the Postmaster General, and hence the act of the President. The acts of Assistant Postmasters General "are the acts of the Postmaster General when confined within the scope of the duties assigned to them by their chief." *United States* v. *Warfield*, 170 Fed. 43, 45 (C. A. 4); to the same effect, see *M'Collum* v. *United States*, 17 C. Cls. 92, 101–102. By Section 1 (b) of Reor-

Nothing in this Court's decision in *Myers* v. *United States*, 272 U. S. 52 (discussed in the petition at pp. 8–13) requires a different result. In holding that the power to remove a postmaster is vested solely in the Executive, the Court recognized that the President must execute the laws "by the assistance of subordinates." 272 U. S. at 117.[4] Moreover, Myers was removed not by personal action of the President, but by an order of the Postmaster General, "acting by direction of the President." 272 U. S. at 106. The only way in which the *Myers* decision would be significant in the instant situation would be if the President had undertaken to remove petitioner in disregard of the statutory procedure; this, of course, was not done. *Myers* recognizes the inherent

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ganization Plan No. 3 of 1949, 63 Stat. 1066, the Postmaster General was authorized to "delegate to any officer, employee, or agency of the Post Office Department designated by him such of his functions as he deems appropriate"; referring specifically to this statutory provision, the Postmaster General, by Order No. 55064, 18 F. R. 8458, authorized the Assistant Postmaster General, Bureau of Post Office Operations, "* * * to take final action in his own name with respect to all transactions relating to personnel of the field postal service * * *." Section 823.116d of the Postal Manual lists as one of the duties of this Assistant Postmaster General the processing of "matters relating to charges and complaints against postmasters in those cases referred to national headquarters."

A contention that a postmaster's removal was invalid because it was done in the name of the Assistant Postmaster General, rather than the Postmaster General, was rejected by the Court of Appeals for the District of Columbia Circuit in *Moroney* v. *Abrams*, No. 13558, decided May 9, 1957.

[4] In this connection, it might be noted that the current Directory of Post Offices lists a total of 23,496 post offices of the first, second, and third classes, all requiring Presidential appointment of their postmasters.

removal authority of the President in postmaster cases but confers no right upon an individual dismissed in another manner to insist that the President himself remove him.

2. Petitioner's second contention (Pet. 13–17) is that the Administrative Procedure Act (5 U. S. C. 1001, *et seq.*) entitles him to judicial review of the merits of his dismissal. A uniform line of decisions, however, both before and after the enactment of this statute, makes clear that the courts will not interfere with the dismissals of executive employees except to insure substantial compliance with prescribed procedural requirements. See, *e. g.*, *Eberlein* v. *United States*, 257 U. S. 82; *Keim* v. *United States*, 177 U. S. 290; *Williams* v. *Cravens*, 210 F. 2d 874 (C. A. D. C.), certiorari denied, 348 U. S. 819; *Kohlberg* v. *Gray*, 207 F. 2d 35 (C. A. D. C.), certiorari denied, 346 U. S. 937; *Powell* v. *Brannan*, 196 F. 2d 871 (C. A. D. C.); *Carter* v. *Forrestal*, 175 F. 2d 364 (C. A. D. C.), certiorari denied, 338 U. S. 832. The Administrative Procedure Act makes no change in this settled rule, since it expressly excludes from its provisions for judicial review agency action which "is by law committed to agency discretion * * * ." 5 U. S. C. 1009. In general, Section 10 of the Administrative Procedure Act has been interpreted to be "merely declaratory of the existing law of judicial review," *Olin Industries* v. *National Labor Relations Board*, 72 F. Supp. 225, 228 (D. Mass.); see, *e. g.*, *Blackmar* v. *Guerre*, 342 U. S. 512; *State of Arizona* v. *Hobby*, 221 F. 2d 498 (C. A. D. C.); *Aktiebolaget Bofors* v. *United States*, 194 F. 2d 145, 149 (C. A.

D. C.); *Almour* v. *Pace,* 193 F. 2d 699 (C. A. D. C.); see, generally, Davis, *Unreviewable Administrative Action,* 15 F. R. D. 411. And the lower courts have properly rejected any attempt to employ the section's provisions to expand the scope of review of agency dismissals. *Alley* v. *Craig,* 97 F. Supp. 576 (D. Me.); *Campbell* v. *Devine,* 81 F. Supp. 657, 660 (D. C. D. C.), affirmed, 194 F. 2d 881 (C. A. D. C.) certiorari denied, 344 U. S. 826; *McEachern* v. *United States,* 84 F. Supp. 902, 904 (W. D. S. C.). The *Attorney General's Manual on the Administrative Procedure Act,* at page 95, states that Section 10 of the Act makes no change in the rule that "a civil service employee of the Federal Government who alleges unlawful removal from office, can obtain judicial review only of the question of whether the procedures of the Civil Service Act were followed."[5]

3. Finally, petitioner alleges (Pet. 17–18) that the proceedings resulting in his removal were fatally defective in that the letter notifying him of his dismissal failed to comply with the requirement of Section 14 of the Veterans' Preference Act, 5 U. S. C. 863, that removal action against a preference eligible employee must be "for reasons given in writing." This contention is clearly without merit. As we have pointed out, the letter of dismissal (Pet. App. C 27) referred specifically to the lengthy and detailed statement of charges which had been served upon petitioner some ten weeks earlier, charges to which he had

[5] The authority of this *Manual* was expressly recognized in *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924 (C. A. D. C.), certiorari denied, 350 U. S. 884.

replied in writing, and it concluded "that the charges have been sustained." This procedure, which fully informed petitioner of the reasons for his dismissal, "complied in all substance with Section 14." *Blackmon* v. *Lee*, 205 F. 2d 13, 14 (C. A. D. C.). Precisely the same language in a letter of dismissal was approved by the Court of Appeals for the District of Columbia Circuit in *Green* v. *Baughman*, (C. A. D. C., No. 13500, decided Jan. 31, 1957), where, as here, the charges were stated in writing and the employee was notified that they were sustained. The court concluded (slip op. 3):

> We think direct reference to the charges as sustained was a sufficient statement of the reasons for the discharge.[6]

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[6] Lurking in petitioner's argument seems to be a further contention of irregularity resulting from the fact that, while the Civil Service Commission sustained the charges against petitioner, it rejected a portion of the specifications and irregularities alleged in support thereof, as not proven. It is well settled, however, that such action on the administrative appeal does not affect the validity of the employee's dismissal, particularly where, as here, only subsidiary or evidentiary matter was involved. For even where the Commission determines that some of the charges themselves are defective, such determination "does not of itself vitiate the Commission's decision that removal on the remaining charges was proper". *Baughman* v. *Green*, 229 F. 2d 33, 34, (C. A. D. C.); *Devine* v. *Campbell*, 194 F. 2d 876, 879 (C. A. D. C.), certiorari denied, 344 U. S. 826; *Williams* v. *Cravens*, 210 F. 2d 874, 875 (C. A. D. C.), certiorari denied, 348 U. S. 819.

## CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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